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1781

O P I N I O N

OF

WILLIAM GRANT^K, Esq;
OF THE INNER TEMPLE,

ON THE

CASE relative to Mr. BENFIELD's CLAIMS, &c.

Which has been stated to

The ATTORNEY-GENERAL, Mr. KENYON,
and the Hon. Mr. ERSKINE.

Mr. GRANT's Opinion.

QUERY I. **A**RE you of opinion, that the Order of the year 1714 remains in full force; or are you of opinion, that it is virtually repealed by the Order of 1766, and the subsequent Order?

ANSWER. The object of the order of 1766, appears to have been to correct certain abuses which had been committed by the Company's Servants, in receiving an exorbitant interest on the loans made by them to the Nabob, his Ministers, and others. To prevent such abuses for the future, the rate of interest is fixed at 10 per cent. and no Servant is to receive more, on pain of being suspended from the Company's service; but every Servant had a right to receive thus much, and to make loans at this rate. It is impossible to suppose, that, in this general regulation, the Company did not mean to include the particular case of loans made to the Nabob. The declared object of the order is to prevent exactions and extortions from him, his Ministers, and others. The evil appears chiefly to have affected the Nabob; the remedy therefore must have been principally intended for his benefit. Exorbitant interest had formerly been exacted from him under various pretences. A moderate rate of interest was now fixed, which was not to be exceeded on any pretence whatever. The prohibition of the former necessarily implies a permission of the latter. It would have been nugatory in the Company to have censured merely the *exorbitancy* of the interest taken from a person to whom no loan could have been made, and from whom consequently no interest could have been received. I am therefore of opinion, that the order of 1714 (if it had not before lost its force by disuse, as I think it had) was virtually re-

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pealed by that of 1766. The most authentic interpretation of the Company's orders, is that which comes from the Company themselves. From several passages in subsequent letters from the Court of Directors, it appears to have been most clearly understood that the order of 1714 no longer continued in force. The order of March 1769 amounts, in my apprehension, to a clear recognition of the legality of the loans made by individuals to the Nabob. It censures the attempt that had been made to give private debts a preference to those due to the Company, and enjoins the Select Committee to procure a renunciation of all power and authority that had a tendency to secure to them such preference. But it adds, " Having done this, you are then to demand " from the Nabob an account of all debts to the Servants of the Company, or inhabitants residing under our protection. You are to examine them separately, and see that they are charged with no higher " interest than after the rate of 10 *per cent.* from the day of the receipt " of our orders on that subject, under date of the 17th May 1766." Hence it appears that the orders of the Company were understood to be perfectly complied with, provided no higher rate of interest was reserved on the loans to the Nabob than that which was permitted by the order of 1766. That order is referred to, as establishing the rate of interest on loans to him as well as to other persons. Loans to him were therefore permitted; for otherwise, as to such loans, no rate of interest could have been established. These loans are so far from being deemed illegal, that the liquidation of them is, in the 14th paragraph of the order 1769, directed to be made a matter of public discussion with the Nabob; and the sanction of the Company's authority is ordered to be given to the measures to be taken for the discharge of his debt to individuals. Had that debt been contracted in defiance of a positive order then existing in full force, it is difficult to conceive that the Company would have interposed their authority to enforce its payment.

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The instructions to the Commissioners in September 1769, far from stating it as illegal in the Company's Servants to lend money to the Nabob at the allowed interest, only represent it as disgraceful to take "undue advantages" of his necessities, and direct the Commissioners to prevent, for the future, "all abuses and injustice in transactions of this sort." The transactions mentioned are loans of money to the Nabob. The practice is permitted to continue. The abuse of that practice is to be prevented. There are other orders stated in the Case which recognize the legality of such loans, but as they are subsequent to the proclamation published at Fort St. George, they will more properly be considered in the Answer to the next Query.

QUERY II. If you are of opinion, that the Order of the year 1714 was destroyed by the Order of 1766, what force is to be given to the Proclamation made at Fort St. George in 1769 by the President and Council?

ANSWER. I do not conceive that the President and Council are authorized to repeal any order of the Company, or, which amounts to the same thing, to revive any old order that may be inconsistent with one of a later date. The order of 1714 is totally inconsistent with those of 1766 and 1769. By the former, all money transactions with the the country powers are prohibited.—By the latter, those Loans only are prohibited, on which an interest of more than 10 per cent. shall be reserved. Loans made at that rate are acknowledged to be legal, and the servants who made them are to have the sanction of the Company's authority in the recovery of their debts. A revival of the order of 1714, would be a repeal of those parts of the Orders of 1766 and 1769, which relate to money transactions with the Nabob. Such a repeal, in my opinion, exceeds the power of the Governor and Council,

and therefore, I think the Order of 1714 was not revived by their Proclamation. The opinion of the Company on this subject, may easily be collected from their subsequent Orders. In March 1771, they declare it to be their pleasure, that no *Military Officer* should in future open an account with the Nabob, or advance any money for which he should become accountable, without the authority of the Governor and Council, or Select Committee. Had there at that time existed in full force a General Order, prohibiting all money transactions between the Nabob and any of the Company's Servants, this special prohibition as to *Military Officers* would have been altogether unnecessary. The particular restraint now imposed, is a proof of the general liberty before enjoyed. In the Company's Letter of March 1772, they order that Messrs. Smith, and Monckton, who had been guilty of exacting exorbitant interest from the Nabob, should make ample restitution of all sums which they may have received for interest, "over and above 10 per cent. per annum, as restricted by our "orders of May 1766." They therefore considered Loans at 10 per cent. as perfectly warranted by the Order of 1766, and they considered that Order as still remaining in full force. The Order of June 1777, which absolutely prohibits all Loans to the country powers, necessarily supposes that no such prohibition was then in force. It is not drawn up as repeating or enforcing any Order previously existing, but as a new regulation, prohibiting, for the future, a thing till then practised and allowed. It does not convey a doubt of the legality of former Loans; on the contrary it declares, that the persons who have made them may proceed to recover their debts as they think fit, having previously delivered in an account of them in the manner thereby directed. Had the Proclamation revived the Order of 1714, this Order would have been unnecessary, and those debts would have been illegal. The same Letter of 1777, directs an enquiry to be made, whether the

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Nabob, or any of his people, had paid to any of the Company's Servants a higher rate of interest than 10 *per cent.* "since the arrival of "orders forbidding the receipt of exorbitant interest." This proves that their Order of 1766, had constantly continued in force down to June 1777—that Loans to the Nabob had been all along in the contemplation of the Company—and that such Loans had been uniformly considered as permitted by the Order of 1766, provided the interest did not exceed 10 *per cent. per annum.*

QUERY III. Does it appear from the facts in this Case, that the Proclamation in 1769, of the President and Council, can be looked upon as an Order of the Company? Or, if such a Proclamation can be looked upon as a revival of the Order of 1714, is it not again virtually repealed by the subsequent Orders of 1772, which declare the Orders of 1766 to be in full force?

ANSWER. The Answer to this Query is in a great measure anticipated by that given to the former. Being of opinion, that the President and Council had no authority to issue the Proclamation of 1769, I, of course, cannot consider that Proclamation as an order of the Company. On the contrary, I take it to have been inconsistent with the then subsisting orders of the Company, and consequently altogether void. Had it operated as a revival of the Order of 1714, I certainly should have thought it repealed by the subsequent Orders of 1772. But those subsequent Orders convince me, that the Company never understood the Order of 1714 to have been revived; nor their former Order of 1766, in the least degree affected by this Proclamation.

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QUERY IV. Can the Orders of the Company of 1771, be construed to extend to Loans made by persons in Mr. Benfield's situation? Or do they appear to be confined to Military Officers only?

ANSWER. From the whole context of the Order of April 1771, I think the words "in our service" must, in fair construction, be understood of the Military Service only. This Order of April 1771, seems to be an extension of that of March 1771, which had prohibited Military Officers from advancing money to the Nabob himself. This extends the prohibition to his tenants. The evident, and indeed the declared intention of the Company, was to provide against a possible abuse of military power. The purpose of making the Order is expressed to be, "to convince the Nabob that *our troops* shall be only used "for his benefit, and that they shall not, in the least, interfere with "his revenue." No circumstance is mentioned that can have the smallest reference to the Civil Servants of the Company. I therefore think they were not meant to be included in this Order. But at all events, as it is stated that Mr. Benfield never made any Loans to the tenants of the Nabob, this Order cannot affect him, whatever may be its construction, as it relates only to Loans made to "the Nabob's "tenants and people."

QUERY V. Upon the whole of the Case, are you of opinion, that Mr. Benfield's Loans, as above stated, are warranted by the Company's Orders?

ANSWER. Having already considered all the Orders stated in the Case, it necessarily follows, from the opinion I have given on the import and effect of each, that I think Mr. Benfield's Loans clearly warranted by those Orders. Could I have conceived a different opinion
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on this subject, I should still have been at a loss to discover the justice or the propriety of punishing one Servant for the breach of an Order, which every other Servant was allowed to neglect, not only with impunity, but with the sanction and the approbation of the Company. Were any distinction to be made, I should think, from the facts stated, that it ought to have been in Mr. Benfield's favour. In the case where the Company ordered their Servants to be assisted in recovering the amount of their Loans, it does not appear that the private benefit to the individual was attended with the least eventual advantage to the public; whereas most of Mr. Benfield's Loans appear to have been made for purposes productive of public utility;—one of them so much so, that had a positive prohibitory Order then existed, I should have thought the breach of the law, in such circumstances, more meritorious than the observance. Even in the Order of 1777, there is not the smallest intimation of a design to punish the Servants who had been, or were then, engaged in Loans to the Country Powers. On the contrary, they are expressly permitted, after giving in their accounts, to proceed to the recovery of their debts as they may think fit. It would be a strange thing to suppose a law to continue in force against one man, when it had ceased to be a rule of action to all the rest of the world.

QUERY VI. What operation is to be given to 13th George III. and to the construction put upon it by the Company in 1777; and whether it extends to protect the Loans made by Mr. Benfield?

Note. Mr. Benfield's Loans were all previous to 1777. You are requested to peruse the Report of the Committee of Correspondence of the India Company respecting Mr. Benfield; which is sent herewith.

ANSWER.

ANSWER. I think the Act of 13 Geo. III. has no application whatever to Mr. Benfield's case. For though it fixes a general rate of interest in India, I do not apprehend that it affects the question, To whom Loans may or may not be made, consistently with the Company's Orders?

Inner Temple,

Jan. 12, 1781.

W. GRANT.



